Office - Supreme Court, U. S.
FILED
MAY 10 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 760

CARMINE PIZZA,

Appellant,

v.

JOHN A. LYONS, AS NEW YORK STATE COMMISSIONER OF CORRECTION, ET AL.,

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO AFFIRM

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York;

WENDELL P. BROWN,
Solicitor General of the State of New York;

HERMAN N. HARCOURT,
Assistant Attorney General of the State of New York,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement and Motion to Affirm	1
Jurisdiction	2
Motion to affirm	2
Opinions below	5
Appendix—Applicable provisions of the New York State Correction Law	6

Table of Cases Cited

Lindsey v. *Washington*, 301 U.S. 397	4
People v. *Washington*, 264 N.Y. 335	2
People ex rel. Ross v. *Wilson*, 250 App. Div. 143	4
Solesbee v. *Balkcom*, 339 U.S. 9	5

Statutes and Other Authorities Cited

Amendments (1948) to the State Correction Law of New York, Sections 230 and 242	3
Constitution of the State of New York, Article IV, Section 4	4
Correction Law of New York:	
Sections 212, 223 (Laws of 1936, Chapter 70) and 242 (Laws of 1935, Chapter 902; Laws 1948, Chapter 631)	2, 3, 6
Sections 230, 233, 236 and 237	2, 3, 6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 760

IN THE MATTER OF THE APPLICATION FOR ORDER IN PURSUANCE OF THE PROVISIONS OF ARTICLE 78 OF THE CIVIL PRACTICE ACT, IN FAVOR OF CARMINE PIZZA,

Appellant,

v.

JOHN A. LYONS, AS A NEW YORK STATE COMMISSIONER OF CORRECTION; THE NEW YORK STATE BOARD OF PAROLE CONSISTING OF FREDERICK A. MORAN, CHAIRMAN, LOUIS F. COSTUMA, REGINALD B. TAYLOR, DONALD H. GRANT, EDWARD DONOVAN, COMMISSIONERS; THE PRISON BOARD OF AUBURN STATE PRISON CONSISTING OF THE PRINCIPAL KEEPER, THE DEPUTY SUPERINTENDENT OF INDUSTRIES, THE HEAD PHYSICIAN AND THE WARDEN OF THE SAID INSTITUTION

APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

MOTION TO AFFIRM

May It Please the Court:

Now come the respondents-appellees in the above entitled cause by their counsel of record and move that the order and judgment appealed from be affirmed.

Jurisdiction

Jurisdiction would appear to exist if the allegations of the appellant were substantial and substantiated.

Motion to Affirm

The motion to affirm is made upon the ground that the decision of the cause depends upon the resolution of the question whether the amendments to New York Correction Law Sections 212, 223 (Laws of 1936, ch. 70) and 242 (Laws of 1935, ch. 902; Laws 1948, ch. 631), as applied to the appellant who was previously convicted of a felony, are unconstitutional as being *ex post facto* laws. The pertinent statutes are New York Correction Law Sections 212, 223, 230, 233, 236, 237 and 242, some of which are reproduced by the appellant in Appendix B annexed to his jurisdictional statement, and the remainder are contained in the Appendix to this Motion to Affirm.

Prior to the amendments, the appellant who had been convicted in 1932 of the crime of murder, second degree, as a second offender, and sentenced to a term of twenty years to life, could only hope to be released from prison by an act of executive clemency.

> "• • • An indeterminate sentence is regarded as a sentence for the maximum term prescribed. (*People* v. *Adams*, 176 N.Y. 351, 362.) The appellant, though sentenced to a term indeterminate in form, has in fact been sentenced to what is a flat term of sixty years. That is so because there is, at this writing, no provision for the parole of second offenders. (See Correction Law, § 223; Cons. Laws, ch. 43.) The minimum term of thirty years means nothing." (*People* v. *Washington*, (1934) 264 N.Y. 335, 338.)

Therefore in 1932 the situation of the appellant as a second offender sentenced to a term of from twenty years

to life was that of one for whom no provision for parole existed, and whose sentence although indeterminate in form, was actually a flat term for life. The minimum term of twenty years meant nothing.

Under these circumstances it would seem that the provision contained in Correction Law Section 230 in 1932 that "No person received in a state prison after July first, nineteen hundred and twenty-six, sentenced to life imprisonment or to imprisonment during his natural life shall have his term diminished either by commutation or compensation, but such person shall serve the full term for which he was sentenced" has a peculiar and devastating significance.

It will be noted that Sections 212 and 223 of the State Correction Law, as they were at the time of appellant's conviction, specifically excluded a prisoner previously convicted of a crime punishable by imprisonment in a state prison from the benefits of parole therein provided. This prohibition was removed from these sections of the law by Chapter 70 of the Laws of 1936.

The amendment in 1948 to State Correction Law Section 230 and the amendment of the same year to Section 242 removed the appellant from the operation of the prohibitions previously existing and permitted him to enjoy the same status as a person convicted for the first time of the crime of murder in the second degree, who had received a sentence of twenty years to life. His minimum sentence could be reduced by the allowance of "earned good time" and he could be admitted to parole.

Thus it is apparent that the amendments of 1936 and 1948 were not *ex post facto*. They ameliorated the conditions under which appellant previously labored by permitting him to be considered for a "statutory" commutation, and he never was deprived of possible executive clemency should the Governor so determine under his

constitutional powers (New York State Constitution Article IV, § 4). In passing it is to be noted that although the Governor usually did attach the conditions suggested by the Legislature in commuting sentences, this

> "• • • was only a courteous gesture toward the Legislature, as that body could neither add to nor detract from the explicit grant by the People of the State". (*People ex rel. Ross* vs. *Wilson*, 250 App. Div. 143, 145)"

The appellant places great reliance upon *Lindsey* v. *Washington*, 301 U.S. 397, and attempts to draw a parallel between that case and this on page 7 of his jurisdictional statement. However a more careful analysis of both cases will reveal that they are not analogous. In the *Lindsey* case the statute under question required a *mandatory* sentence of fifteen years, whereas the statute in existence at the time of the commission of Lindsey's crime did not provide for such a mandatory sentence. Also in the *Lindsey* case the minimum sentence was removed from the power of the court to impose and left to the whim of the Board of Parole. In this case the penal statute was not changed, but the procedural changes in the statute were effected to provide relief to the appellant from the prohibitions and disqualifications as to allowance of "earned good time" and parole under which he previously suffered. Surely these provisions cannot be said to have been more onerous so as to render the later laws *ex post facto* as to the appellant.

The amendment of 1948 to Section 242 placed the statutory and discretionary power to reduce the sentence of a prisoner solely in the prison board but did not affect the Governor's constitutional clemency powers. The interjection of the Parole Board into the picture under the 1948 amendment was not new, inasmuch as the Parole Board

was given jurisdiction over a prisoner in the appellant's position by the 1936 amendment in order to ameliorate his previous position of not being eligible to parole at all.

Since the exercise of executive clemency is an act of grace and not of right, it does not appear that any constitutional right of the appellant has been invaded. The power of executive clemency may be delegated. This Court in *Solesbee* v. *Balkcom*, 339 U.S. 9 said, p. 12:

> "Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts. See *Ex parte United States*, 242 U.S. 27, 42, and cases collected in Note, 38 L.R.A. 577, 587."

Opinions Below

The opinions of the courts below are contained in Appendix A annexed to appellant's jurisdictional statement, and are therefore not repeated here.

Dated: March 27, 1952.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York,
Attorney for Respondents-Appellees;
WENDELL P. BROWN,
Solicitor General of the
State of New York;
HERMAN N. HARCOURT,
Assistant Attorney General,
of the State of New York,
Counsel for Respondents-Appellees,
The Capitol, Albany, N. Y.

APPENDIX

NEW YORK STATE CORRECTION LAW

Article 8 (consisting of §§ 210-223)

In 1932:

§ *223. Application of article.* The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison and who has never before been convicted of a crime punishable by imprisonment in a state prison. It shall not apply to any other persons. All provisions of law applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight and repealed by this act shall be transferred to the rules of the board of parole and shall continue to have the same force and effect of law as before this repeal. (L. 1932, c. 457, § 1)

As amended by Laws of 1936:

§ *223. Application of article*

The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison. All rules of the board of parole applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight, shall continue to have the force and effect of law. As amended L. 1932, c. 457; L. 1936, c. 70, § 3, eff. March 6, 1936.

NEW YORK STATE CORRECTION LAW

Article 9 (§§ 230-249)

In 1932:

§ *230* (L. 1932, c. 601, § 1).

• • •

Every prisoner received in a state prison or penitentiary on or after July first, nineteen hundred thirty-two, under

either a definite or indeterminate sentence, may earn compensation not to exceed seven and one-half days for each month of his minimum term in the case of an indeterminate sentence, or on the term as imposed by the court in the case of a definite sentence.

In the case of a definite sentence prisoner, said compensation shall be deducted from the term as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner compensation shall be deducted from the minimum term of such sentence, less jail time allowance. * * * No person received in a state prison after July first, nineteen hundred and twenty-six, sentenced to life imprisonment or to imprisonment during his natural life shall have his term diminished either by commutation or compensation, but such person shall serve the full term for which he was sentenced. * * *

NOTE: Correction Law Section 230 was extensively amended by L. 1935, c. 902. However § 16 of that law specifically prohibited any retroactive effect thereof.

In 1948: (The section was amended and the subdivision renumbered.)

§ 230. *Definite sentence; indeterminate sentence; discretionary reduction of sentence.* 1. A sentence to imprisonment in a state prison for a definite fixed period of time is a definite sentence. A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence.

2. Every prisoner confined in a state prison or penitentiary may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction.

3. In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year, nor shall any prisoner confined in a penitentiary have his sentence reduced under the provisions hereof until he shall have served at least three months exclusive of jail time. No prisoner sentenced to life imprisonment or to imprisonment during his natural life shall have his term reduced by the provisions hereof. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned.

4. An account based upon the maximum reduction of ten days in each month shall be kept in suitable books by the warden for each prisoner who may be entitled to benefit from reductions under the provisions of this section, and at the end of each month the warden shall tentatively credit the prisoner with the portion of such reduction for such period as the case may justify.

In re Appl. for Order in Pursuant of the provisions of Art. 78 of the C.P.A. in favor of Carmine Pizza Pet. Applt. vs. John A. Lyons as a New York State Commrs. of Correction, et al., Respts. Respts.

STATE OF NEW YORK,
Cayuga County Clerk's Office, ss:

I, JAMES D. SHAYLER, Clerk of the County of Cayuga, and of the Supreme Court of said State, and of the County Court of said County, each being a Court of Record and having a Common Seal, do hereby certify that I have compared the annexed and foregoing copy of Statement and

Motion to Affirm, with the original entered on March 31, 1952, in this office and now remaining on file and that the same is a correct copy of such original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, at Auburn, N. Y., this 5 day of May, 1952.

James D. Shayler, Clerk. (Seal.)

"Endorsed."
Cayuga County Clerk's office.
Filed March 31, 1952, at 9:30 A. M. Action No. 2337.